Supreme Court, U.S.
FILED
JUL 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-2055 (3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ALBERT K. BROWN; CATHERINE D. BROWN; KENT ROSENBERG; ARLENE ROSENBERG; VICTOR SCHULER; ELIZABETH SCHULER; DONALD E. WOOD; ELLEN L. WOOD; AMERICAN NATIONAL BANK, a State Banking Corporation, Trustee under the EARL HILLIARD TRUST; MARGARET HILLIARD; JEROME A. RAY; KAREN M. RAY and KENNETH R. HILLIARD
Petitioners

v

SHELL OIL COMPANY, a Delaware Corporation,
Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF FILED BY SHELL OIL COMPANY, RESPONDENT

Philip R. Rosi
John N. Seaman, Jr.
Attorneys for Petitioners
THOMPSON, ZIRNHELT, BOWRON & ROSI, P.C.
229 Lake Avenue
Traverse City, MI 49685-1067
Tele: (616) 946-8630

THE AMERICAN PRINTING COMPANY
615 SECOND AVENUE, DETROIT, MICHIGAN 48226 — (313) 963-9310

5 pp

PETITIONERS' REPLY BRIEF TO BRIEF FILED BY SHELL OIL COMPANY, RESPONDENT

In its Brief in Opposition to Petition for Writ of Certiorari, Respondent acknowledges that the Court of Appeals' Decision was founded upon a false premise. Furthermore, Respondent's Brief is predicated upon a mistaken view of the nature of Petitioners' rights as owners of royalty interests.

INDEX OF AUTHORITIES

CASES:	Page
Brown v *Shell Oil Co.*, 128 Mich. App. 111, 339 N.W.2d 709 (1982)	1
Burnet v *Harmel*, 287 U.S. 103, 53 S.Ct. 74, 77 L.Ed. 199 (1932)	2
Mobil Oil Corp. v *Dept. of Treasury*, 121 Mich. App. 293, 328 N.W.2d 367 (1982), aff'd 422 Mich. 473, 373 N.W.2d 730 (1985)	1, 2

ARGUMENT

I. RESPONDENT ACKNOWLEDGED THAT THE COURT OF APPEALS BASED ITS DECISION ON A FALSE PREMISE.

The Court of Appeals' decision is founded upon an alleged concession by Petitioners:

> "In this appeal, plaintiffs concede that they are producers as defined by this staute." *Brown* v *Shell Oil Co.*, 128 Mich. App. 111, 113, 339 N.W.2d 709 (1982).

Petitioners have consistently argued that they had made no such concession (Petition Appendix C at Page C-42) and for the first time Respondent in its COUNTER STATEMENT OF THE CASE acknowledged that Petitioners were correct:

> "Petitioners appealed (the Circuit Court) ruling to the Michigan Court of Appeals arguing that royalty interests did not fall within the statutory definition of 'producer' . . ." Respondent's Brief at Page 3.

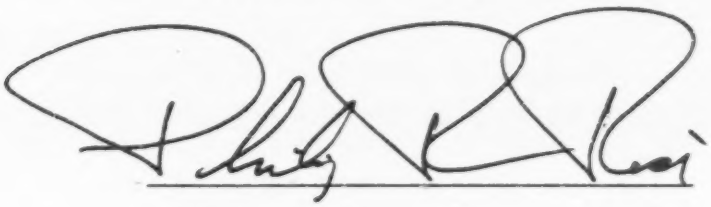
It may not be reaching to presume that, had Respondent acknowledged the inaccuracy of the Court of Appeals premise at the time Respondent answered Petitioner's Application for Leave to Appeal to the Michigan Supreme Court, that Court might not have Denied Leave, and the present Petition would have been unnecessary.

II. RESPONDENT'S INTERPRETATION OF THE PETITIONERS' RIGHTS AS ROYALTY OWNERS DOES NOT CONFORM TO MICHIGAN LAW.

Respondent's assertion in its "COUNTER STATEMENT OF THE CASE" that "As owners of royalty interests, Petitioners are entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance" is in direct conflict with decisions of the Michigan Court of Appeals and Michigan Supreme Court in *Mobil Oil Corp.* v *Dept. of Treasury*, 121 Mich. App. 293, 328 N.W.2d 367 (1982), aff'd. 422 Mich. 473, 373 N.W.2d 730 (1985), both cases previously cited by Petitioners.

The Michigan Court of Appeals in *Mobil* rejected the proposition that royalty payments to non operating property owners were a share of the proceeds from the sale of oil and gas produced. Instead, relying upon a decision of the United States Supreme Court in *Burnet* v *Harmel*, 287 U.S. 103, 53 S.Ct. 74, 77 L.Ed. 199 (1932), the Court of Appeals concluded that "royalty payments under the oil and gas lease are not payments for the purchase of the oil and gas produced. Rather, they are payments for the privilege of exploiting the land which is the subject of the lease" 121 Mich. App. at 303. Affirming the position of the Court of Appeals, the Michigan Supreme Court cited several federal decisions to support its conclusion that while the right to receive royalties represents an economic interest in the oil and gas itself, royalty proceeds were analagous to rents received rather than to sales proceeds (422 Mich. at 482) or a share thereof (422 Mich. at 486).

Respectfully submitted,



Philip R. Rosi
John N. Seaman, Jr.
Attorneys for Petitioners
THOMPSON, ZIRNHELT, BOWRON & ROSI, P.C.
229 Lake Ave., P.O. Box 1067
Traverse City, MI 49685-1067

Dated: July 25, 1986